* Pas Appeal

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

SHAWN LEON JENKINS,
Defendant-Appellee.

Supreme Court
No.
Court of Appeals
No. 240947
Circuit Court
No. 01-1356 FH

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PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT IDENTIFYING JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Plaintiff-Appellant, the People of the State of Michigan, applies for leave to appeal the judgment of the Michigan Court of Appeals in *People v Shawn Leon Jenkins*, unpublished opinion per curiam of the Court of Appeals, decided November 18, 2003 (Docket No. 240947). The majority and dissenting opinions are attached to this application as Appendix A.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. The dissenting Court of Appeals judge properly characterized the police officers' actions, initially, as not implicating Fourth Amendment protections and, subsequently, as supported by reasonable suspicion. Was the majority opinion to the contrary clearly erroneous?

Plaintiff-Appellant answers, "Yes."
Defendant-Appellee answers, "No."
The circuit court answered, "No."
The Court of Appeals Majority answered, "No."

II. Did the Court of Appeals clearly err by failing to address the reasonableness of the officers' investigation of the trespassing complaint?

Plaintiff-Appellant answers, "Yes."
Defendant-Appellee answers, "No."
The circuit court answered, "No."
The Court of Appeals Majority answered, "No."

STATEMENT OF FACTS

This Statement of Facts will closely track the facts included in both the majority and dissenting opinions for the Court of Appeals decision, with some supplementation from the suppression hearing transcript.

Two officers from the Ann Arbor Police Department were dispatched to a housing complex in a high-crime area on a complaint of noise and open alcohol containers.[1] Police encountered 15 or more people in the vicinity, and as one of the officers was engaging Defendant and another man in conversation, an apparent resident of one of the units indicated toward Defendant and said "Who the fuck are you and why are you on my porch?"[2] As the Ann Arbor Police Department is charged with enforcing the trespass statute, one of the officers asked Defendant if he lived at the complex.[3] Defendant replied in the negative and upon request handed his Michigan identification card to the officer.[4]

Defendant became aware that the officer was checking his identity against the police computer and began acting nervously. He also began walking away from police and attempted to place his hand into a deep cargo-style side pants pocket.[5] People unrelated to the encounter were offering Defendant refuge from the police in various apartments. One of the officers verbally encouraged Defendant to remain in the area pending identification, and eventually physically and verbally detained him.[6]

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[1] *People v Shawn Jenkins*, unpublished opinion per curiam of the Court of Appeals, decided November 18, 2003 (Docket No. 240947). See Appendix A, Majority Opinion p1.
[2] Evidentiary Hearing Transcript, Appendix B, p6 of 53.
[3] Appendix A, Majority Opinion p1; Appendix B p6.
[4] Appendix A, Majority Opinion pp1-2.
[5] Appendix B, pp8-9. The record indicates it was a deep cargo pocket on the side of Defendant's pants rather than just a "front pants pocket" as suggested in the Majority Opinion, Appendix A p2.
[6] Appendix A, Majority Opinion p2.

When the information from the police LEIN computer came back, it revealed an outstanding warrant for Defendant's arrest. As an officer was arresting/seizing Defendant, the gun for which Defendant is charged in this case fell from Defendant's pants.

After a suppression hearing, the circuit court found that police seized, not detained, Defendant at the time of the request for identification. The circuit court suppressed the gun and dismissed the single charge of Carrying a Concealed Weapon. In a 2-1 decision, the Court of Appeals affirmed the suppression and dismissal.[7]

Appellant will present additional facts as they relate to the issues in this application.

[7] Appendix A.

ARGUMENT

The majority of the Court of Appeals panel clearly erred, and its error, if permitted to stand, will cause material injustice. Preliminarily, the dissenting judge's analysis illustrates that the majority clearly erred. Furthermore, certain aspects of the majority's analysis not addressed by the dissent were also clearly erroneous. For both of these reasons, discussed in more detail in the two argument sections below, Plaintiff-Appellant requests this Court grant leave on this suppression issue; or, in the alternative, that this Court in lieu of granting leave orders relief consistent with either or both of Appellant's analyses.

I. The dissenting Court of Appeals judge properly characterized the police officers' actions, initially, as not implicating Fourth Amendment protections and, subsequently, as supported by reasonable suspicion. The majority opinion to the contrary was clearly erroneous.

Standard of Review

This Court reviews decisions of the Court of Appeals for clear error and material injustice.[8] As for the findings and rulings in the circuit court, and as the majority preliminarily noted, a reviewing Court analyzes the circuit court's findings of fact for clear error and the circuit court's ultimate decision whether to suppress de novo.[9]

Discussion

As noted in the preamble to this argument section, Appellant believes that the dissenting member of the Court of Appeals articulated a proper analysis of the suppression issue, and in so doing tacitly illuminated clear error in the majority's analysis. Obviously, then, this part of Appellant's analysis necessarily tracks the

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[8] MCR 7.302(B)(5).

[9] *People v Jenkins*, unpublished opinion per curiam of the Court of Appeals, decided November 18, 2003 (Docket No. 240947). See Appendix A, Majority Opinion p2, citing *People v Darwich*, 226 Mich App 635, 637 (1997).

dissenting opinion appended to this Application. Although Appellant will seek to supplement the Dissent's analysis in the second numbered section of its argument, in this first numbered portion Appellant primarily and humbly offers the analysis of the Dissent. Appellant will merely endeavor to draw this Court's attention to particular errors in the majority opinion as they stand in contrast to the Dissent's analysis.

The Dissent began its analysis by concluding that the encounter between police and Defendant did not begin as an investigatory stop. Appellant notes that there are three types of police/citizen encounters; police questioning in a public place, a *Terry* stop, and an arrest or seizure.[10] These three tiers require different tiers of justification; police questioning in a public place requires no justification and therefore does not implicate any Fourth Amendment analysis,[11] while a *Terry* stop requires reasonable suspicion and an arrest requires probable cause.[12] Again, the Dissent found that the police encounter up to and including the request by police for identification and the subsequent transfer of the Michigan identification card by Defendant to police did not require reasonable suspicion or probable cause.

Of course the Majority came to a different conclusion. But that this conclusion was wrong is supported in part by its gratuitous and illogical recapitulation of the facts. Appellant will point to two such instances. First, the majority noted that "[w]hen (police) asked defendant if he lived there, he forthrightly told the officer that he did not."[13] Whether Defendant was being forthright is irrelevant and illogical, in large part because no one (except Defendant) knew whether he was being forthright until after the fact.

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[10] *People v Shabaz*, 424 Mich 42, 56-58 (1985); citations omitted.
[11] *People v Sinistaj*, 184 Mich App 191, 195 (1990); citations omitted.
[12] *Shabaz*, 424 Mich at 57-58.
[13] See Appendix A, Majority Opinion p2.

Painting Defendant in this favorable light is unnecessary and improper within the confines of the relevant Fourth Amendment analysis. Whether Defendant was forthright has no bearing on whether the encounter up to that point was consensual. Indeed, "[w]hile most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response."[14]

Second, in the next sentence of its opinion the Majority notes that "defendant was not engaging in the conduct for which the officers were summoned to the area...."[15] This Court has recently upheld police investigation of a marijuana offense that occurred after police were originally summoned for a trespassing complaint;[16] Appellant submits that the broader proposition is that police behavior is to be evaluated against a reasonableness standard and not against the dispatch sheet's notation as to the type of call. Therefore, the Majority's post hoc opinion of what the police were and were not allowed to investigate should have no bearing on the only relevant inquiry, that being whether the encounter remained consensual. Note that even though this case eventually evolved into a charge of Carrying a Concealed Weapon, at this relevant point in time police were properly investigating two complaints; open alcohol containers and trespassing. That the first was the original complaint and the second arose subsequently requires no particular behavior on the part of the police to re-establish that the encounter was consensual.

At this point it is important to note that both the Majority and the Dissent agreed that the circuit court erred in relying on the officers' subjective belief that Defendant was

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[14] *People v Shankle*, 227 Mich App 690, 699 (1998); citing *Immigration & Naturalization Service v Delgado*, 466 US 210, 212; 104 S Ct 1758; 80 L Ed 2d 247 (1984).
[15] See Appendix A, Majority Opinion p2.
[16] *People v Custer*, 465 Mich 319, 327 (2001).

not free to leave.[17] And objectively, police did nothing to transform the original consensual encounter regarding the alcohol complaint into a coercive stop or seizure regarding the trespassing complaint. Therefore, up through the point when police requested identification, the entire encounter was consensual.

The Dissent went on to conclude that Defendant's behavior, coupled with the totality of the circumstances including numerous invitations by unknown subjects offering to harbor Defendant from police, gave police reasonable suspicion to briefly stop Defendant pending confirmation of his identity.[18] Appellant agrees that this analysis compels the conclusion that the police acted reasonably as defined by the Fourth Amendment. It follows that suppression was wrong.

II. The Court of Appeals clearly erred by failing to address the reasonableness of the officers' investigation of the trespassing complaint.

Standard of Review

This Court reviews decisions of the Court of Appeals for clear error and material injustice.[19]

Discussion

As noted at the close of the first section of argument in this Application, Appellant agrees with the Dissent that the totality of the circumstances sufficiently gave police the requisite suspicion to briefly detain Defendant. Appellant further submits, however, that police had reasonable suspicion to detain Defendant before even asking for identification.

[17] Appendix A; Majority Opinion p3 and Dissenting Opinion p1.
[18] Appendix A; Dissenting Opinion p2.
[19] MCR 7.302(B)(5).

It matters not what circumstances brought the police to the public gathering in this case, merely that they were permissibly present; a point that is not contested. Once on the scene, a woman whom police could have reasonably inferred was a resident of a nearby dwelling gave the police reasonable suspicion that Defendant was trespassing. Specifically, she stuck her head out of a doorway, pointed at Defendant, and said "Who the fuck are you and why are you on my porch?"[20]

Regardless of why police were first called to the scene, one of their multiple responsibilities is enforcing the trespass statute.[21] Given the challenge by an apparent resident, and regardless whether Defendant lived there or not, police from that moment on were not only permitted, indeed they were obligated, to investigate a possible trespass transgression. They therefore were obligated to act on the reasonable suspicion that a crime was being committed in their presence. And it was constitutionally reasonable for them to detain Defendant long enough to ascertain his identity.

Therefore, even before reaching the correct conclusion that Defendant's nervousness; his repeated attempts to put his hand inside a large pocket; his attempt to walk away from police when he knew his identity was being investigated; his presence in a high-crime area; and the various attempts by other subjects to harbor Defendant from police all supported a conclusion that police had sufficient suspicion to detain Defendant,[22] it is plain that police had reasonable suspicion requisite to detain Defendant while they identified him pursuant to a trespassing investigation.

A counter-analysis is illustrative. Under the Majority's analysis, once Defendant volunteered his Michigan identification card he was free to leave. Once gone, when the

[20] Appendix B, pp5-6 of 53.
[21] Appendix B, p6 of 53.
[22] Appendix A, Dissenting Opinion p2.

police confirmed the existence of an arrest warrant for Defendant, police would have then been forced to undertake a pursuit that no one questions would have been permissible. In the meantime, Defendant would have had the opportunity to dispossess himself of any illegal weapons or contraband. The constitution does not compel this illogical, counter-productive result. The constitution likewise does not require that each police officer have the entire LEIN database memorized such that police would have been permitted to effect the arrest warrant upon Defendant the moment they laid eyes on him.[23]

Therefore, in addition to the analysis offered by the Dissent in the Court of Appeals, that court clearly erred in not concluding that police reasonably investigated the trespassing complaint, reasonably detained Defending pending confirmation of his identity, reasonably seized Defendant pursuant to an arrest warrant, and reasonably seized the firearm subsequent to the seizure of his person. For this additional reason, suppression was wrong.

[23] Under the "police team" theory, *People v Dixon*, 392 Mich 691, 698 (1974), if it was permissible for officers on the scene to identify Defendant then it was permissible for them to arrest Defendant in accord with information passed on by a colleague at the LEIN terminal.

RELIEF REQUESTED

Plaintiff-Appellant respectfully requests this Court grant leave to appeal on the issue of the propriety of the police officers' actions. Alternatively, Plaintiff-Appellant respectfully requests relief consistent with either of both of the analyses of the Dissent in the Court of Appeals or Plaintiff-Appellant.

Respectfully submitted,
Brian L. Mackie (P25745)

By: MK CO
Mark Kneisel (P49034)
Assistant Prosecuting Attorney

Date: 12/2/03

PROOF OF SERVICE
The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on 12/2 2003
By: ____U.S Mail____Express Mail
____Hand Delivered____Fax X Inter Office
Signature